No. 14054

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE SLAFF,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition to Review a Decision of The Tax Court of the United States.

BRIEF FOR APPELLANT.

FILED

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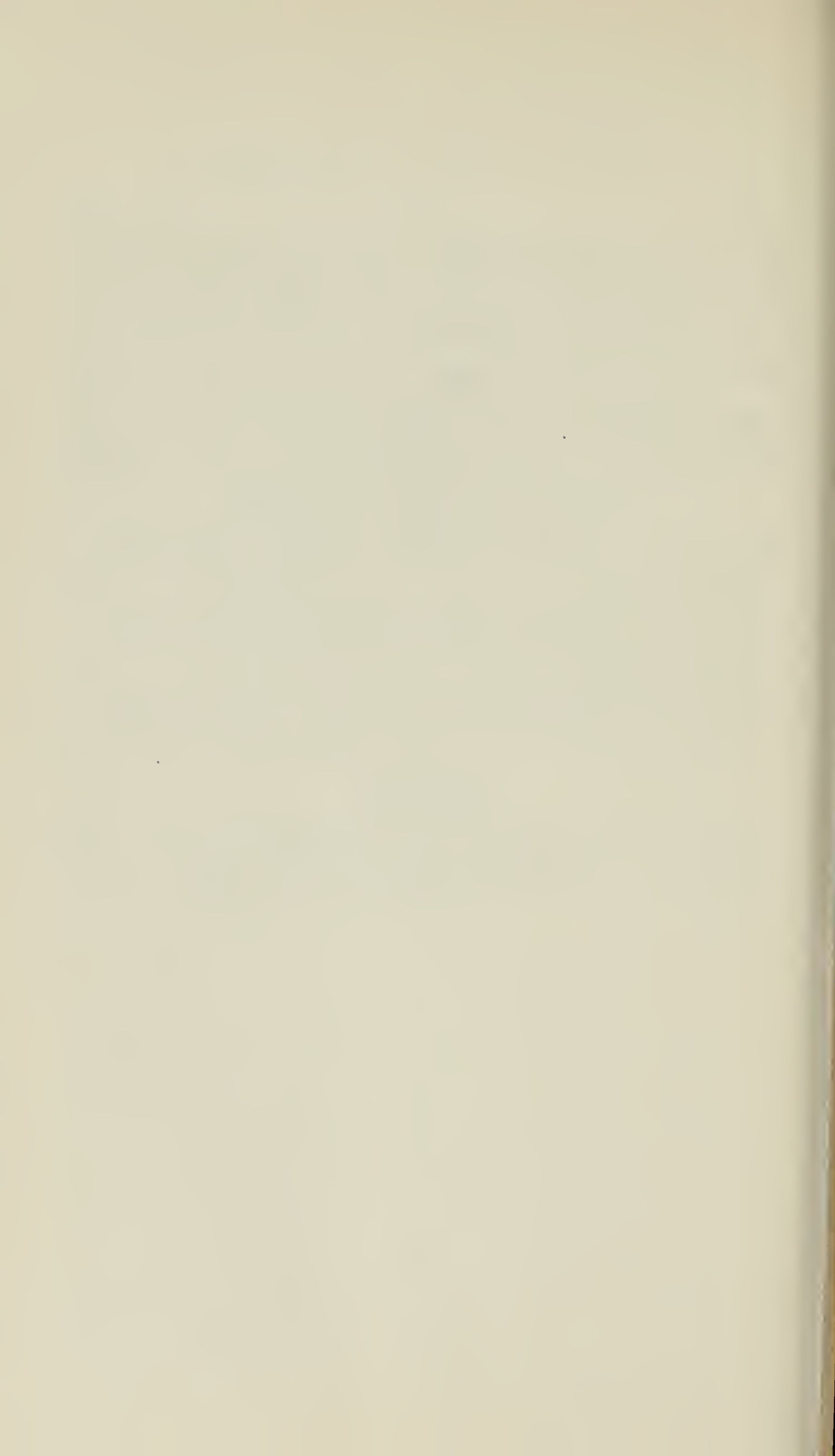

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George Slaff,

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On Petition to Review a Decision of The Tax Court of the United States.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Tax Court of the United States entered June 8, 1953, upholding deficiencies assessed against Appellant by the Collector of Internal Revenue as follows:

1943—Income and Victory Tax, $356.25

1944—Income Tax, $473.00

This appeal is taken pursuant to the provisions of Sections 1141 and 1142, Internal Revenue Code, and is before this Court pursuant to written stipulation between Appellant and Counsel for the Respondent that the decision of the Tax Court might be reviewed by this Court.

Statement of Case and Questions Involved.

This appeal presents for the first time in any Circuit Court the question of whether one who fully reports his total income on his individual tax return in the section headed "Income" or "Your Income" and, at the same time, claims that the income reported is exempt from taxation because of a specific provision of law (in this case, Sec. 116, I. R. C.) has, *in fact, omitted to report* an amount properly includible in gross income in excess of 25% of the amount of gross income stated in the return, and thus has caused the Statute of Limitations to be extended from the normal period of three years set forth in Section 275(a), Internal Revenue Code, to the exceptional five-year period provided for in Section 275(c).[1]

The other question presented is whether or not Appellant was, in fact, a bona fide resident of a foreign country or countries during the years in question and therefore exempt from taxation by reason of Section 116, Internal

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[1]Sec. 275. Period of Limitation upon Assessement and Collection.

Except as provided in Section 276—

(a) General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * * * * * *

(c) Omission from Gross Income.—If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time within 5 years after the return was filed.

Revenue Code. It is, of course, Appellant's position that there is no need for the Court to decide this point since the assessment was barred by the three-year Statute of Limitations.

There is no dispute as to the facts. They may be taken (with one correction which will be noted) as set forth in the Tax Court's Findings of Fact [R. 37-39], with the exception of the last two findings (not set forth here) which are the Court's Conclusions, as follows:

> "For reasons of physical disability, petitioner, an individual, was classified by his draft board as 4-F and was refused entrance into three branches of the Armed Services in which he sought to enlist. Petitioner applied for overseas service with the American Red Cross (hereinafter called 'Red Cross') and was employed by that organization in June or July, 1942. He received a leave of absence from the Federal Power Commission where he held the position of principal attorney, made a complete disposition of the real property he owned in the United States, and gave up his apartment in Washington, D. C., which was the only permanent abode or residence he had maintained in the United States up to that time.
>
> "Having applied for and received an American passport, he was ordered by the Red Cross to England in September, 1942. He flew there as a civilian passenger on a civilian airline. From October to December, 1942, he served with the Red Cross in Greenock, Scotland, and lived there with a civilian family rather than at the Red Cross quarters.

"In December, 1942, petitioner was assigned to North Africa where he served as Executive Aid or Executive Assistant to the Delegate to North Africa until October, 1943. While in North Africa he had an apartment in Algiers for a time and a house for a time.

"From October, 1943, until August, 1944, petitioner served in Naples, Italy, as Director of Food Supply for the Red Cross. For the bulk of his time there, he shared an apartment with a correspondent of the National Broadcasting Company.

"In August, 1944, petitioner was assigned to France, serving at Marseilles and Dijon until the middle of December, 1944. In Dijon, he lived in an apartment.

"In December, 1944, petitioner was returned to the United States in order to make appearances on behalf of the Red Cross. The Federal Power Commission subsequently requested petitioner to return to its service. He did so in April or May of 1945, being engaged as chief counsel in charge of a nation-wide investigation of natural gas resources, a different capacity from that which he had left in 1942.

"Petitioner's intention upon going overseas was to return to the United States after serving abroad whatever period of time might be required. He was advised by counsel that he was liable for taxes in England and France during the war, but he paid no taxes to either country.

"On April 28, 1947, petitioner filed his returns for the years 1943 and 1944 with the collector of internal revenue for the fifth district of New Jersey. He stated on the first page of his 1943 return under the heading 'Income' the following:

" 'American Red Cross—Overseas Sept. 1942 to Dec. 1944. Income received $3300; exempt under Section 116 I. R. C.; therefore no taxable income.'

"After the words 'Enter total here,' he wrote 'None.' A similar statement was made in the return for 1944."

> (*Note*—This is a correct statement with respect to the 1944 return although it should be noted that there is no heading over the column where the total is to be entered. It is correct also with respect to the 1943 return except for the fact that in the 1943 return the notation was "Total" instead of "Enter total here" and the columns where the total was to be entered were headed respectively "Column 1—Income Tax Net Income" and "Column 2—Victory Tax Net Income" and it was under these headings that Appellant wrote in each case the word "None.")

"Notice of deficiency was mailed by respondent to petitioner on June 19, 1950, more than three years after the returns were filed. No waiver extending the Statute of Limitations has been filed, entered into or made by petitioner or anyone acting on his behalf."

ARGUMENT.

POINT I.

The Claim of Exemption From Taxation of Fully Stated Income Did Not Constitute an Omission to Report.

The question involved is a very simple one. Did Appellant *omit* from his statement of gross income contained in his returns any amount properly includible therein?

In this case, the Commissioner would disturb the normal three-year statute of limitations for assessment by asserting a deficiency more than 3 years after the filing of the returns showing *on their face* Appellant's entire income, designated as "Income Received" in the Section entitled "Income" and "Your Income" respectively.

The Code allows a five-year period where the taxpayer omits to report more than 25% of his gross income (I. R. C., Sec. 275(c).) But since this constitutes an exception to the Statute of Limitations, it has been established in the leading case of *C. A. Reis,* I. T. C. 9, affd. 142 F. 2d 902 (C. C. A. 6), that the Commissioner, when relying upon this exception, has the burden of proving the basis for its application.

It is conceded that Appellant's total income in each of the two years in question was $3300—the amount stated on the face of each of his returns as "Income Received" under the headings "Income" (on the 1943 return) and "Your Income" (on the 1944 return). The Court below held that the Appellant's claim that the amount stated by him as "Income Received" was exempt from taxation "necessarily results in a failure to include that amount or in fact any amount whatever in his gross income" [R. 41].

We submit that the Court's decision is at war with the language of Section 275(c), with the purpose of Section 275(c), and with the cases which have dealt with it.

The Language of Section 275(c).

Section 275(c) uses clear language. It is entitled "*Omission* from Gross Income." The word "omit" is the key word of the section and decisive of its meaning and intent. "If the taxpayer *omits* from gross income . . ." There is nothing mysterious about the meaning of the word "omit." It is simple and explicit, without hidden significances or obscure connotations. Webster's New International Dictionary (2d Ed., 1939) defines "omit" as "To leave out or unmentioned; to abstain from inserting or naming." This is not only its commonly understood meaning—it is its only meaning. In *Ewald v. Commissioner,* 141 F. 2d 750, 752 (C. C. A. 6), the Court defined "omit" as meaning "to disregard, to fail, forbear, neglect to mention, or to fail to insert or include."

By its use of the word "omit" Congress unmistakably limited the scope of the section to the situation of "leaving out," of "failing to mention," of "not naming." Neither in the words nor in the purpose of the section, as disclosed by its legislative history can there be found the slightest indication that Congress intended that the exception it was creating to the normal 3-year Statute of Limitations should apply to the situation where the taxpayer fully stated his total income, as such, at the place in the return set out for this purpose, even though he accompanied that statement by a claim of exemption from taxation.

That the word "omit" was, in fact, carefully and deliberately chosen by Congress is clear from the legislative history of the section.

Legislative History.

Section 275(c) was created by Congress as an execption to the long-standing, normal 3-year Statute of Limitations. It was originally a product of a subcommittee of the House Ways and Means Committee of the 73rd Congress. This subcommittee conceived of the section as a corollary to the unlimited period of assessment of taxpayers filing no returns, and in fact the House adopted its recommendation that the new provision be made a part of Section 276, relating to fraud and failure to file returns and carrying no period of limitation on assessment. The subcommittee stated in its report, issued December 4, 1933:

> "Your subcommittee is of the opinion that the limitation period on assessments should also not apply to certain cases where the taxpayer has understated his gross income on his return by a large amount, even though fraud with intent to evade tax cannot be established. It is, therefore, recommended that the statute of limitations shall not apply where the taxpayer *has failed to disclose in his return* an amount of gross income in excess of 25 percent of the amount of the gross income stated in the return. The Government should not be penalized where a taxpayer is so negligent *as to leave out items* of such magnitude from his return." (Hearings before Committee on Ways and Means, 73rd Cong., 2d Sess., p. 139.) (Emphasis supplied.)

In other words, the subcommittee viewed the leaving out of a return of items of gross income aggregating

more than 25% of the gross income reported as tantamount to filing no return, and therefore as invoking the same considerations as induced the Congress to eliminate the bar of the statute of limitations in cases of the failure to file any return: that is, the prejudice to the Commissioner of having to assess a deficiency within a limited time where the taxpayer, by not reporting his income, made it difficult for the Commissioner to discover it. Curiously, at hearings before the full Committee, the Treasury, through Roswell Magill, expressed opposition to the bill, because it felt that three years was time enough for the Government "to find out about these things, and that it is desirable at some time for a taxpayer to be able to know that his liability is closed in the absence of fraud." (*Id.* at p. 149.)

In a colloquy that ensued between Congressman Jere Cooper of Tennessee, speaking for the subcommittee, and Mr. Magill, the following was developed:

> "Cooper: What we really had in mind was just this kind of a situation: Assume that a taxpayer left out, say, a million dollars; he just forgot it. We felt that whenever we found that he did that we ought to get the money on it, the tax on it.
>
> Magill: I will not argue against you on that score.
>
> Cooper: In other words, if a man is so negligent and so forgetful, or whatever the reason is, that he overlooks an item amounting to as much as 25 percent of his gross income, that we simply ought to have the opportunity of getting the tax on that amount of money.
>
> Magill: Yes; so far as the cases you have mentioned are concerned, we would certainly agree with

> you. Now, the fellow we were thinking of—and maybe we thought of him too much—is the individual who had honestly tried to include all he thought he should have, but he did not."

Following these hearings, the House Committee adopted the bill of its subcommittee with the explanation that its aim was to reach "taxpayers who are so negligent as to leave out of their returns items of such magnitude" (*i. e.,* gross income items in excess of 25% of reported gross income). (*House Ways & Means Committee Report,* H. Rep. No. 704, 73rd Cong., 2d Sess., p. 35.) Significant in this report and in the foregoing colloquy and in the subcommittee report quoted above are the references to "items" and to the "leaving out" or "overlooking" or not "including" same.

Also significant is the placing of this measure, in the original House bill, in the section relating to the filing of no return, which is only a more wholesale sort of leaving out of items of receipt. A five-year limitation was ultimately put upon the assessment of omissions of gross income in the Senate, in response to the Treasury's plea for the fellow "who had honestly tried to include all the thought he should have, but he did not." Thus, the Senate report states:

> "It is believed that in the case of a taxpayer who makes an honest mistake, it would be unfair to keep the statute open indefinitely. For instance, a case might arise where a taxpayer *failed to report* a dividend because he was erroneously advised by the officers of the corporation that it was paid out of capital or he might report as income for one year an item of income which properly belonged in another

year." (*Senate Finance Committee Report,* S. Rep. No. 558, 73rd Cong., 2d Sess., pp. 43-44.)

It is impossible to examine the history of this section without becoming convinced that it was designed to give the Commissioner a period longer than 3 years to discover income in the case of taxpayers who had failed in a substantial respect to report their income fully. All the discussion, all indicia of intent point specifically and only at the taxpayer who, to use the Committee's words, "failed to disclose," who was "so negligent as to *leave out* items of such magnitude," who "left out," who was "so negligent and so forgetful, or whatever the reason is, that he *overlooks* an item amounting to as much as 25 percent," who "failed to report."

Nowhere can there be found the slightest intimation that Congress intended that a taxpayer who fully reported his entire income on his tax return and in fact did so at the very place set forth on the return for the reporting of income and in addition, reported it as "Income Received" could make a claim of exemption from taxation only at the peril of extending the statute of limitations if his claim of exemption was denied.

Congress was making an exception to the normal statute in the case of those taxpayers whose actions, whether deliberate or otherwise, were such as either to keep the Commissioner in ignorance of their actual gross income or to make it difficult for him to discover what it was. Congress had not the slightest reason or desire to extend the statute in the case of taxpayers who fully and clearly reported the total amount of their income.

To hold, as did the Court below, that the taxpayer's claim that his fully stated income was exempt from income

tax is the equivalent of a failure to report any gross income, is to depart completely from both the plain words and the clear intent of the statute. It is also contrary to the decided cases.

The Cases.

The Court below relied upon 3 Tax Court cases as the basis for its decision. (In the case of *M. C. Parrish & Co.,* set out by the Court below as "3 T. C. 119, 130-131, affd. (C. A. 5) 147 F. 2d 284," the question of the Statute of Limitations was not raised on appeal.) Even those cases, however, as we will briefly point out later, do not support the Court's decision and, in fact, bear out appellant's position with respect to the purpose and intention of Section 275(c).

That Section 275(c) cannot be tortured into applying to the case at bar appears clearly from the very recent case of *Uptegrove Lumber Co. v. Commissioner* (C. C. A. 2), 204 F. 2d 570, decided June 29, 1953.

There, too, the Commissioner sought to apply the 5 year statute of limitations to an assessment which the taxpayer asserted was barred by the 3 year limitation of Section 275(a). The facts are set out in the Court's opinion, page 571, as follows:

> "The taxpayer is a manufacturing corporation. The present deficiency assessment grows out of the Commissioner's late discovery of legal impropriety and substantial resultant error in taxpayer's computation of its gross income in its 1944 return. In this computation, as it appeared on the fact of the return, *the taxpayer first set out a correct statement of its gross sales.* From that figure it then subtracted an amount designated as 'the cost of goods sold.'

> This 'cost' was itself an aggregate of items including a reserve for retroactive wage increases pursuant to demands then pending before the National War Labor Board, but later disallowed. It is not disputed now that this contingent reserve could not lawfully be included in the cost of goods sold. On the face of its return the taxpayers subtracted this inflated cost item from correctly stated gross sales and accordingly arrived at an incorrect gross profit from sales. The error was carried forward when this stated profit was added to other income to arrive at a 'total income' figure. *The end result was an understatement of this total by more than 25%.* This understatement is the basis of the deficiency assessment made more than three years later in reliance upon the language of Section 275(c) which permits assessments within a five-year period in situations where a taxpayer 'omits from gross income an amount properly includible therein which is in excess of 25% of the amount of gross income stated in the return.'" (Emphasis supplied.)

The Court reversed the Tax Court's decision in favor of the Commissioner and held that Section 275(c) was inapplicable and the assessment was barred by the three year limitation of Section 275(a).

In its opinion, the Court carefully examined the legislative history of Section 275(c) and concluded that:

> "the history of Sec. 275(c) persuasively indicates that Congress was addressing itself to the situation where a taxpayer *shall fail to include some receipt* or accrual in his computation of gross income and not in a more general way to errors of whatever kind in their computations." *Supra,* page 572, (Emphasis supplied).

The Court's opinion is clear as can be that Congress had no intention of changing, and that the language of Section 275(c) does not change, the 3 year period of limitations with respect to the taxpayer who fully and openly reports the amount of his total income in the gross income section of his return.

To be sure, if there is an actual omission (of over 25%), the fact that the omission was made in good faith will not serve to prevent the application of Section 275(c). Nor, indeed, should it. For there the objective mischief which Congress was aiming at is present, the increased difficulty under which the Commissioner must labor in order to discover the taxpayers true income and the consequent necessity for additional time before the Commissioner's inquiry is barred.

Similarly where *someplace* in the return, other than in the gross income section, a figure appears which in fact is the amount of the full gross income but is not in the gross income section nor clearly stated to be that, Section 275(c) has properly been held to apply. For in such case, too, there is in fact present "the mischief of effective concealment by nondisclosure which the extended limitation period of Section 275(c) was designed to offset." (*Uptegrove v. Commissioner, supra,* p. 573.)

Thus, this Court in *O'Bryan v. Commissioner,* 148 F. 2d 456 (C. C. A. 9), properly held Section 275(c) to apply in that case, although the tax returns there involved did show, someplace on the returns, the total amount of taxpayer's earning. This Court, however, fully understood the reason for Section 275(c) and the evil that Congress was trying to offset. The correct basis

for the application of Section 275(c) to that case and situations like it was stated by this Court at page 459:

> "The mere appearance of the total amount of gross income *somewhere* on the face of an income tax return is not sufficient to prevent an omission within the terms of Sec. 275(c). *The government is not required to search carefully throughout a tax return to ascertain some fact which will put it on notice of error.*" (Emphasis supplied.)

This is the essence of the reason for Section 275(c) and the valid basis for holding that it applied to the taxpayer in the *O'Bryan* case. As the Tax Court had said in the *O'Bryan* case below, 1 T. C. 1137, 1146:

> "Petitioner suggests that the section should not be applied when a taxpayer has made a 'full disclosure' in his returns. The question need not be decided in this case; for in our judgment no full disclosure was made."

In the *O'Bryan* case on appeal, this Court went on to say, page 460:

> "To satisfy the terms of the section *the figure which represents gross income and from which net income is derived* must not be understated by an amount in excess of 25% of that figure. In the instant case, gross income was shown as only half the correct amount." (Emphasis supplied.)

By the very tests which this Court set down in the *O'Bryan* case, Appellant at bar cannot be held within the purview of Section 275(c).

The total amount of Appellant's gross income here did not appear merely "somewhere" on the face of his returns. It appeared—*and in full*—in the sections headed respec-

tively "Income" and "Your Income" for the two years involved. Moreover it was additionally designated by Appellant as "Income Received."

The government was "not required to search carefully" (or at all, for that matter) throughout Appellant's tax return "to ascertain some fact which will put it on notice of error." The government did not require a day after even the most casual glance at the return, let alone two years beyond the normal period of the statute of limitations, to ascertain any fact which would put it on notice that it disagreed with taxpayer's interpretation of the law regarding the taxability of his income.

The single "figure which represents gross income and from which net income is derived" in Appellant's return was not understated by as much as a nickel, let alone by 25%. It was stated at 100%—$3,300. It was stated as "Income Received." It was stated in the section headed "Income" or "Your Income." Appellant's gross income was shown not as "half the correct amount" as in the *O'Bryan* case, or as any part, less than the whole, of the correct amount, but as the full, entire, complete, whole correct amount—$3,300.

What is gross income? Insofar as is applicable here, Section 22, Internal Revenue Code, defines "gross income" as "gains, profits and income derived from salaries, wages, or compensation for personal services . . ." What did Appellant report in both his returns? His "income derived from salaries, wages or compensation for personal services" rendered for the American Red Cross. How did Appellant report this? As "Income Received." Where did Appellant report this? In the sections headed "Income" and "Your Income" for the respective years.

In reporting the amount of this income, did he "leave out or unmentioned" any part thereof? Did he "abstain from inserting or naming" any part thereof? Did he "disregard" or "fail, forbear or neglect to mention" or "fail to insert or include" any part thereof in his statement of his "income derived from salaries" from the American Red Cross? The answer can be read on the face of the returns. It is clear that *he omitted nothing.*

To be sure, if Appellant's return had merely stated "Taxpayer was employed by the American Red Cross overseas Sept. 1942—Dec. 1944 and whatever income he received is exempt from taxation under Sec. 116 I. R. C. and therefore taxpayer has no taxable income," without stating the amount of his income, then Appellant might have "omitted" to report any gross income and Section 275(c) might apply. For there, as in the *O'Bryan* case, *supra,* and in *Ewald v. Commissioner,* 141 F. 2d 750 (C. C. A. 6), and *Ketcham v. Commissioner,* 142 F. 2d 996 (C. C. A. 2), there could be said to have been an actual "failure to enter certain items of gain in the gross income sections of the returns" (*Uptegrove v. Commissioner, supra,* p. 573). But that simply was not the fact here and no amount of rationalization can turn a complete reporting into a complete omission.

The Tax Court's entire method of approach was as incorrect as its conclusion. (See *Van Bergh v. Commissioner,* 18 T. C. 518.)

There, petitioner had computed his tax and reported his income so as to avail himself of the benefits of Section 107, Internal Revenue Code, which in certain cases permits the spreading over a three-year period of the tax on income from personal services, 80% of payment for which is received in one taxable year. The Tax Court

found that although the amount in question was not stated on page One of the returns (Form 1040, as in the case at bar) it was set forth in various schedules explaining the taxpayer's tax computation. The Court pointed out, page 521, *supra*:

> "Curiously enough, there is no item on the Individual Income Tax Return Form expressed as indicating 'gross income.' *It cannot hence be argued that the mere failure to insert the figure at any designated place in the return constitutes its omission from 'gross income.'*" (Emphasis supplied.)

The Court concluded as follows, page 522, *supra*:

> "We conclude that by computing his tax and reporting his income so as to avail himself of the benefits of Section 107, petitioner did not omit from gross income any part of the compensation affected; and that accordingly not the 5- but the 3-year Statute of Limitations applies. It being concluded that the deficiency notice was issued beyond the 3-year limit, respondent's action is barred and *it becomes unnecessary to consider the substantive question whether or not petitioner was entitled to the tax computation he claimed.*" (Emphasis supplied.)

Certainly in the case at bar, Appellant was equally entitled to have the question of the statute of limitations decided independently and in advance of the substantive question of whether or not he was entitled to the tax exemption he claimed.

None of the three Tax Court cases which the Court below relied on (*M. C. Parrish & Co.*, 3 T. C. 119; *American Foundation Co.*, 2 T. C. 502; *Emma B. Maloy*, 45 B. T. A. 1104) actually support the Court's position with respect to Appellant.

Maloy was a case in which Section 275(c) was held *not* to apply.

American Foundation Co. was, like the *O'Bryan* case, *supra,* a case where there was an undisputed omission from gross income as stated in the return of an amount in excess of 25% of the amount stated, although "at some place in the return" (*supra,* p. 509), the details of the sale of the shares (not included in the amount of gross income reported) were to be found.

M. C. Parrish is the case upon which the Commissioner, and apparently the Court as well, relied most heavily. There again was a situation akin to the *O'Bryan* case where there was in fact an omission from the amount reported as gross income and where the Government should properly not have been "required to search carefully" through the return to put it on notice of all the facts of the taxpayers' true income. In the *Parrish* case, the Tax Court pointed out with respect to the two schedules in which the disputed amount was stated that "at neither place was the amount reported as 'gross income.' The term 'gross income' is defined in Sec. 22(a), *supra*" (p. 130, *supra*).

The *Parrish* case certainly cannot be held to apply where Appellant has reported his total "income derived from salaries, wages or compensation for personal services" (gross income, as defined in Sec. 22(a)), as "Income Received" and in the gross income section of the tax return.

We submit that the Tax Court was completely in error in holding that Section 275(c) applied and that, on the contrary, the deficiency assessment was barred by the three-year limitation of Section 275(a).

POINT II.

Appellant Was a Bona Fide Resident of Foreign Countries During the Years in Question, and His Income Was Therefore Exempt From Taxation.

We believe the Court need not come to a consideration of this point because the Commissioner's claim is barred by the Statute of Limitations. However, the fact is that Appellant was a bona fide resident of foreign countries during 1943 and 1944 and consequently his income was exempt from taxation.

Sections 116(a)(1) and (2), Internal Revenue Code, as amended by Section 148(a) of the Revenue Act of 1942 provide:

> "(a) Exclusion of earned income from foreign sources.—Section 116(a) relating to earned income from sources without the United States is amended to read as follows:
>
> "(a) Earned income from sources without the United States.—
>
> "(1) Foreign resident for entire taxable year.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States . . .
>
> "(2) Taxable year of change of residence to United States.—In the case of an individual citizen of the United States, who has been a bona fide resi-

dent of a foreign country or countries for a period of at least two years before the date on which he changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25(a) if received from source within the United States; . . ."

Treasury Regulation 111 (as amended by T. D. 5373, 1944, C. B. 143) provides in Section 29.116-1 as follows:

"Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4 and 29.211-5 (of the Treasury Regulations) relating to what constitutes residence or non-residence, as the case may be, in the United States in the case of an alien individual."

Section 29.211-2 of the Regulations, which is the basically controlling section, provides:

"Definition.— . . .

"An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is *determined by his intention with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient.* If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for

> a definite purpose which in its nature may be promptly accomplished is a transient; but *if his purpose is of such a nature that the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. . . .*" (Emphasis supplied.)

The question of residence in a case like this is a factual one to be decided on the specific facts involved. *Bouldin v. Commissioner,* 8 T. C. 959, 967, "Residence is, of course, mainly a question of fact and each case naturally must be determined upon its own facts."

See also:

H. F. Baehre v. Commissioner, 15 T. C. 236.

Mertens Law of Federal Income Taxation, Vol. 3, Sec. 19.31, points out: "Any temporary place of abode may be a residence." "Residence" does not by any means imply or require permanence of fixed duration of stay abroad.

Now let us examine the controlling provision of Section 29.211-2 above.

> "An alien actually present in the United States (substitute 'foreign country or countries' as far as Appellant is concerned) who is not a mere transient or sojourner is a resident of the United States (foreign country or countries) . . ."

Appellant was, of course, "actually present" in the foreign countries. Was he then a mere "transient or sojourner" in those countries? Definitely not, for "whether he is a transient is determined by his intentions with regard to the matter and length of his stay."

The record is clear and uncontradicted as to Appellant's intentions with regard to "the length and nature of his stay." He intended to stay abroad in the foreign lands where he was to work and serve, "as long as I was required to remain abroad, *whether that might take a year or two years or five years;* whatever the exigencies of that particular situation might demand" [R. 22]. This was no matter of being abroad for a brief stay and quickly returning to the United States. When Appellant left the United States in September 1942, it was with the knowledge that his stay abroad was going to be a long one. The subsequent fact of his absence from the United States for well over two years bears out completely his stated intention to stay abroad for as long as he was required to stay abroad, no matter how long that might be.

The Regulation is equally clear that "a mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a 'transient.' " Clearly Appellant's intention to return to the United States, which he frankly stated on his direct examination [R. 22] "when and if" his service with the American Red Cross overseas was completed, was certainly no more than "a mere floating intention" and it was with equal certainty, "indefinite as to time."

Appellant's intentions were clearly within the purview of the Court's holding in *Swenson v. Thomas, Commissioner,* 164 F. 2d 783, 784 (C. C. A. 5).

> "*But notwithstanding the fact that he established no fixed home in Colombia, or even a settled place of abode, his work requiring him to be ever on the move,* it remains true that he was always living in

Colombia, attending to his business there; and that we think constitutes residence there.

"The Regulation above referred to makes no difficulty. It excludes 'a mere transient or sojourner' and correctly. A transient means literally 'one going across' or passing through. 'Sojourner' is built around the French word 'jour,' meaning a day, and signifies a mere temporary presence or visit. The Regulation continues: 'A mere fleeting *(sic)* intentention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. *If he lives in the United States (or Colombia) and has no definite intention as to his stay he is a resident.* One who comes to the United States (or Colombia) for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment and to that end the alien makes his home temporarily in the United States (or Colombia) he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.' Under this elaborate explanation Swenson was a resident in Colombia, for his business was likely to require 'an extended stay' and did take four years. Making his 'home temporarily' in Colombia does not mean necessarily buying a house or changing his domicile. It means no more than living there temporarily, though his business requires him to move from place to place."

Even actual return to the United States during the period in question has been held not to negate bona fide foreign residence abroad where it is the taxpayer's intention to remain indefinitely until his work abroad is com-

pleted. (*Myers v. Commissioner,* 180 F. 2d 969 (C. C. A. 4).)

There the Court pointed out even (p. 971) that "an individual can have two residences" and this did not militate against its finding that the taxpayer was a bona fide resident of a foreign country for purposes of exemption from United States income tax pursuant to Section 116(a), Internal Revenue Code. Similarly the Court found such bona fide residence to exist despite the fact that the taxpayer had returned to the United States five times during the year in question.

Certainly Appellant's continued absence from the United States for well over two years without any return during that period points even more strongly to bona fide residence abroad. The Court, in the *Myers* case, pointed out that in a similar case, *Yaross v. Kraemer, Commissioner,* 83 Fed. Supp. 411, the Court there had found that eleven visits to the United States from Canada did not militate against the Court's finding that petitioner's bona fide residence was in Canada.

The Regulation continues "one who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; . . ." Neither by foresight nor by hindsight can it be asserted that the purpose which Appellant was seeking to accomplish by his service with the American Red Cross was something "which in its nature (might) be promptly accomplished." One need only think back to September, 1942, and the conditions which existed at that time, to recollect only too well that there was certainly no prospect then that Appellant's services abroad might "be promptly accomplished." And, of course, the fact is that the services

were not "promptly accomplished." On the contrary, Appellant was squarely within the scope of the balance of the sentence we have just been considering—"but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, *though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.*"

For the accomplishment of that purpose for which an extended stay was necessary, Appellant made his home temporarily in the foreign countries where his work required him to be. Like the taxpayer in *Harvey v. Commissioner,* 10 T. C. 183, Appellant was an unmarried man [R. 31]. As that court said there (p. 189),

> "in effect, to use a colloquial expression 'his home was where he hung his hat.' Plainly, his position is broadly different from one who had a home, a wife, and children residing in the United States."

Here too, Appellant's home "was where he hung his hat." In fact the record is clear *and uncontradicted* that, prior to going abroad, Appellant had given up his home in the United States [R. 31] and had cut all his ties there, even to the extent of making a complete disposition of the real estate which he owned [R. 32, 37-38]. There was nothing in the United States which could be called Appellant's home or from which any conclusion could rightfully be drawn that Appellant was a resident of the United States during the period in question. On the contrary, Appellant made "his home temporarily" (in the words of the Regulations) in England where he lived with a private family [Tr. p. 4] and in the other countries where

he maintained either a house or an apartment [Tr. pp. 4-5].

The specific sentences of the Regulations we have been considering re-emphasize that Appellant's intention to return to the United States when his work was finished does not negate his residence abroad. If Appellant has met the tests of (1) purpose of such a nature that an extended stay abroad might be necessary for its accomplishment, and of (2) making his home temporarily abroad, then by definition "he becomes a resident (of the country or countries) though it may be his intention at all times to return to his domicile abroad (substitute 'United States' in this case) when the purpose for which he came has been consummated or abandoned."

In *Yaross v. Kraemer, Commissioner, supra,* 83 Fed. Supp. 411, the Court pointed out (p. 412) many differences of fact from *Downs v. Commissioner,* 166 F. 2d 504, in which this Court found unfavorably to taxpayer's claims of residence abroad. An examination of the record herein in comparison with the *Downs* case will similarly disclose the same degree of difference in facts which require a finding favorable to Appellant's claim of bona fide residence abroad.

In this connection, we call the Court's attention also to *White v. Hofferbert, Commissioner,* 88 Fed. Supp. 457. There the Court pointed out (p. 466), that in the *Downs* case the taxpayers

> "were handled, controlled and restricted much the same as military personnel. It is obvious that their situation was vastly different from that of the taxpayer in this case whose employment for service abroad was of indefinite duration while that of the taxpayer in the *Downs* case was strictly limited."

Similarly, the record below is clear that petitioner herein was not "handled, controlled and restricted much the same as military personnel." On the contrary, petitioner left the United States not under military or quasi-military orders, but as a civilian under an American passport [R. 20 and 38]. He traveled on a civilian airline [R. 20 and 38]. And wherever he went, England, North Africa, Italy or France, petitioner lived not in military or quasi-military quarters but in a home or a house or an apartment of his own [R. 21, 22 and 38]. Again, as the Court pointed out in the *White* case, the duration of the taxpayer's employment for services abroad, in *Downs*, was strictly limited, while that of petitioner herein with the American Red Cross "was of indefinite duration."

It is unnecessary to recapitulate each aspect of the facts herein, but it seems clear that by every test of logic, of applicable principle of the Regulations and of the basic elements in the decided cases, Petitioner was a bona fide resident of a foreign country or countries from September, 1942 to December 22, 1944, and thus pursuant to Section 116(a)(1) and (2), Internal Revenue Code, exempt from payment of income tax during the period in question herein.

Conclusion.

It is submitted that the Court below was in error, both as to the period of the Statute of Limitations and as to the question of whether Appellant was a bona fide resident of a foreign country or countries pursuant to Section 116 and the applicable regulations, and that on either ground the decision of the Tax Court should be reversed.

Respectfully submitted,

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Pro Se.